JD(NY)-01-04
Jamaica, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

INTERNATIONAL BONDED COURIER, INC.

and Case 29-CA-25748

DAVID GORE, an Individual

Rachel Zweighaft, Esq., for the General Counsel.
Joseph Paranac, Jr., Esq., for the Respondent.

DECISION

Statement of the Case

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in Brooklyn, NY on November 19, 2003.[1] Upon a charge filed on July 29, a complaint was issued on September 23, alleging that International Bonded Courier, Inc. ("Respondent" or "IBC") violated Section 8(a)(1) of the National Labor Relations Act, as amended (the "Act"). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Respondent filed a letter-brief on December 19.

Upon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a New York corporation, with its principal office and place of business in New Hyde Park, NY, and a place of business in Jamaica, NY, has been engaged in the delivery of mail and packages. Respondent admits that it has purchased and received at its Jamaica facility goods valued in excess of $50,000 directly from points located outside New York State. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. In addition, it has been admitted, and I find, that Amalgamated Industrial Toy and Novelty Workers of America, Local 223, AFL-CIO (the "Union") is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates refer to 2003 unless otherwise specified.

II. The Alleged Unfair Labor Practices

A. The Facts

1. Background

In December 2002 the Union began an organizing campaign at the Jamaica facility. On March 5, 2003 the Union filed a petition seeking to represent drivers, walkers, mail-sorters, data entry and warehouse employees employed at the Jamaica facility. Pursuant to a Stipulated Election Agreement an election was held on April 4, in which the Union did not receive a majority of the ballots cast. David Gore, the Charging Party, served as the Union observer at the election. The Union did not file objections to the election.

2. Threat of Discharge

The complaint's only allegation is that in February or March, Rishard Maharaj, an admitted supervisor of IBC, unlawfully threatened employees with discharge, if they supported the Union.

Gore, a walker or messenger, testified that in early March Maharaj asked him "who was the Union guy?" Gore replied that he did not know. Gore further testified that Maharaj then told him, "because, you know, IBC and unions do not get along and you could lose your job". Gore testified that he spoke to the Union organizer, Anthony Miranzi, at least three or four times a week. Yet, even though Gore was the Union observer at the election, he never mentioned the alleged threat to Miranzi.

Maharaj denied that he threatened Gore or any other employee with loss of jobs. He testified that Respondent's counsel instructed him as to what could be said during a campaign. Specifically he remembered that he could not threaten employees or interrogate them concerning their Union activities.

As mentioned earlier, Gore spoke with the Union representative three to four times a week. Especially since he was the Union observer, it is incredible to me that if he were in fact threatened with the loss of his job, that he would not have communicated this to Miranzi, and that the Union would not have then filed objections to the conduct of the election. I do not credit Gore's testimony. Instead, I credit the testimony of Maharaj that he did not threaten employees with loss of jobs for Union activities. Accordingly, I find that General Counsel has not shown by a preponderance of the evidence, that Respondent has engaged in an unfair labor practice. Therefore, the allegation is dismissed.

3. Motion to Amend Complaint

On the day of the hearing General Counsel moved to amend the complaint by alleging that Michael Watkins was a supervisor and agent of IBC and that in March Watkins interrogated employees at the Jamaica facility, in violation of Section 8(a)(1) of the Act. It was agreed that Respondent's counsel was first advised of the proposed amendment at 3:30 P.M. the day before the hearing.

General Counsel argued that the decision in *Redd-I, Inc.,* 290 NLRB 1115 (1988) supported her motion to amend. Counsel for Respondent, on the other hand, vigorously

objected to the motion, arguing that a letter written by the Regional Director in *this* proceeding stated that the Board would not prosecute an allegation that IBC engaged in illegal interrogation.

On September 10 the Regional Director wrote to the Charging Party, with copies to General Counsel, Respondent, and Mr. Paranac, IBC counsel. Relating to Case 29-CA-25748, the instant proceeding, the letter stated: "Decision to dismiss…I have concluded that further proceedings are not warranted on those portions of the Charge alleging that the employer interrogated employees concerning their union activities…". The letter continued, "The remainder of the Charge, alleging that the employer threatened employees with discharge…is being processed further." Thus, in accordance with the Regional Director's letter the only allegation in the complaint is the one dealing with the alleged threat of discharge by Maharaj.

In *Redd-I, supra,* Don Kelley was named as an alleged discriminatee in a charge filed September 30, 1985 (Case 10-CA-21246). This charge was subsequently withdrawn. On January 6, 1986 a new charge was filed which was the basis for the *Redd-I* decision (Case 10-CA-21436). The new charge did not name Kelley as an alleged discriminatee. However, at the hearing, General Counsel moved to amend the complaint to include an allegation concerning Kelley's discharge. The Judge denied the motion. The Board disagreed with the Judge, stating (id. at 1115-16): "We do not find the withdrawal of an *earlier* timely charge concerning Kelley's discharge relevant in deciding whether the discharge allegation is closely related to the charge in *this* case" (emphasis added).

I believe that the decision in *Redd-I, supra,* is distinguishable from the instant proceeding. In *Redd-I* the Board pointed out that a dismissal or withdrawal of a *prior* charge should have no bearing on whether information elicited in a subsequent case is sufficiently "closely related" to warrant an amendment to the complaint in the subsequent case. In the instant proceeding, however, the Regional Director specifically stated that there would be no allegation of interrogation in *this* case. I believe that Respondent and its counsel had the right to rely on that representation. Accordingly, I denied General Counsel's motion to amend the complaint.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated the Act in the manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[2]

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

D. Barry Morris
Administrative Law Judge